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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

DON RAY PHINNEY,

Petitioner,

vs.

FIRST AMERICAN NATIONAL BANK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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36 pp

QUESTIONS PRESENTED

I. Whether a Federal Judge is under a mandatory duty to recuse himself from hearing a case where:

1. The Judge has recently represented the defendant Bank in the case;

2. The Judge has recently held stock in the defendant Bank corporation;

3. The Judge has an outstanding loan with the defendant Bank;

4. The Judge did his personal banking with the defendant Bank, and had done so for many years.

II. Whether the failure of a Federal Judge to recuse himself from a case under the above-cited circumstances requires reinstatement of a jury verdict which was set aside by an order granting the defendant Bank judgment notwithstanding the verdict.

PARTIES TO THE PROCEEDING

In addition to the Petitioner herein the other party to the proceeding in the Court below is the First American National Bank.

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Periodicals

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OPINION BELOW

The opinion of the Court of Appeals for the Circuit was filed on March 15, 1984, and appears as Appendix A. The opinion is unpublished.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 2101(c).

STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure, Rule 60(b)(6) provides:

> "On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
> ...
> (6) Any other reason justifying relief from the operation of the judgment."

Title 28, United States Code, Section 455 provides:

> "(a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartial-

ity might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

...

(4) He knows that he, individually, or a fiduciary, or his spouse has a financial interest in the subject matter in controversy ...."

STATEMENT OF THE CASE

This case was originally filed in the United States District Court for the Middle District of Tennessee on July 3, 1974, by transfer from the District Court in the Western District of Tennessee. Prior to that time the case had pended in the United States District Court for the Central District of California.

The case was tried before a jury on October 23, 24, 25, and 29, 1978 in the Court of the Honorable Thomas A. Wiseman, United States District Judge. The jury returned a verdict in favor of Petitioner on October 30, 1978,

after being instructed that to find for the Petitioner the evidence had to show that Respondent had committed fraud, perjury and forgery in obtaining a prior criminal conviction of the Petitioner. After being so instructed, the jury awarded the Petitioner $999,999.00 in compensatory damages, and $250,000.00 in punitive damages.

On June 1, 1979, the trial Court entered an Order pursuant to Respondent's motion which: (1) directed the entry of judgment notwithstanding the verdict in favor of Respondent, and; (2) conditionally granted a new trial if the judgment notwithstanding the verdict were reversed on appeal.

On March 18, 1981, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court.

On August 26, 1982, Petitioner moved the United States District Court For The Middle District of Tennessee for an Order vacating the judgment notwithstanding the verdict, and

for reinstatement of the jury verdict. On December 8, 1982, the District Court denied the motion. The denial of the motion was affirmed by the United States Court of Appeals for the Sixth Circuit on March 12, 1984.

STATEMENT OF THE FACTS

Petitioner, prior to 1967, went to Nashville, Tennessee, to launch a singing career.

In Nashville, petitioner met with Mr. Bob Ferguson of RCA Records who introduced him to writers and singers with Tree Publishing Company. Petitioner began demonstration recording sessions in 1965 and then in late 1965 and the first half of 1966 petitioner recorded master tapes, produced under Mr. Buddy Killen of Tree Publishing.

During the summer of 1966, petitioner began traveling to Los Angeles pursuing record contracts.

While in Nashville, petitioner's parents sent money regularly, as they had agreed. Pe-

titioner had opened an account with Commerce Union Bank, through its officer Owen Farrell. He also had accounts at his home banks. From January through the summer of 1966, petitioner had extraordinary expenses in the master tapes and travel, causing an ever-increasing need for additional financing. Mr. Farrell and his superiors agreed to continue to honor petitioner's checks until the account reached approximately $27,000.00. At this point, Commerce Union called on petitioner to sign a note, secured by Tree Publishing royalties, to cover the debt. This petitioner did.

In September 1964, petitioner began cashing checks at Respondent's 19th and West End Branch near petitioner's apartment. Many times petitioner cashed checks at the bank without problem. In late September 1966 petitioner had understood that his father was placing funds in his home accounts, and rely-

ing on this, cashed the following checks:

Date of Check	Drawee Bank	Amount
Sept. 28, 1966	First Freeport Bank	$150.00
Sept. 28, 1966	First Freeport Bank	200.00
Sept. 29, 1966	First Freeport Bank	200.00
Oct. 3, 1966	First Freeport Bank	250.00
Oct. 4, 1966	Brazosport Bank	250.00

There were two (2) additional checks cashed during this period, making a total of seven (7). Unknown to petitioner, his father did not deposit funds but sent the money to petitioner.

In October, petitioner realized that the checks he had cashed would not be good and, on his own volition, went to the 19th and West End Branch of Respondent, carrying a $2,000.00 Cashier's Check to pay the checks. Bank records indicate that the date of this visit was October 11, 1966. It is undisputed that petitioner explained on this occasion what had happened; that

there were checks which would be returned and that he desired to pay them. Only two (2) of the checks totaling $400.00 had been returned to date and Mr. Phinney paid these. Petitioner was instructed to come back later and see if the other checks had come in. Mr. Edgar Jones suggested that Mr. Phinney open an account, which he did.

Petitioner further explained that he was traveling regularly between Hollywood and Nashville at the time.

When Petitioner was next in Nashville on October 31, 1966, he again went to the 19th and West End Branch of Respondent. He testified that he went for the express purpose of seeing if the remainder of the checks had come in. Mr. Jones told him that five checks, totaling

$1,050.00 had come in since petitioner's last visit. Petitioner was without cash to cover the $1,050.00 at the time and tendered one check for that amount made payable to the Respondent. Petitioner testified that it was his understanding that this check was to be held to be replaced by cash but Mr. Jones testified that he sent the check to one of Mr. Phinney's Texas banks "for collection" although Mr. Jones testified that he had no copies of transmittal letters to or from the Texas bank, as he should normally have had.

By the undisputed proof, petitioner made a third voluntary trip to the 19th and West End Branch in mid-November, 1966, while he was back in Nashville from yet another trip to the West Coast. Petitioner talked with Owen Farrell upon his return to Nashville. Mr. Farrell told him that Mr. Jones was trying to get in touch with him. While Mr. Farrell did not remember

talking to Mr. Jones about Mr. Phinney, Mr. Jones testified that he had indeed talked to Mr. Farrell about Mr. Phinney. At any rate, on November 15, 1966, Mr. Phinney went to the branch of the bank and asked for Mr. Jones. A young officer of the bank, M.V. Hussung, Jr. told him that Mr. Jones was at lunch but that Mr. Jones had left instructions that Mr. Phinney was to sign a note. Petitioner testified that he signed the note form, prepared by Hussung, which was for $1,050.00, and left the bank.

Petitioner went back to the West Coast. On January 31, 1967, he was offered -- and signed -- a seven (7) year personal management contract with Mr. Raymond Katz of Hollywood. Mr. Phinney and his entire family were elated over this development. The undisputed proof indicates that Raymond Katz was a personal manager of highest

regard in the music industry and that he managed top artists, including Mac Davis, Dolly Parton, Cher, Petula Clark, Eva Gabor, Kate Smith, Anthony Newley and Donnie and Marie Osmond. Respondent's own music industry expert testified that Raymond Katz was "one of the top" personal managers in the record industry and that a contract with Raymond Katz would indeed be valuable to a young artist. The proof further indicates that Mr. Katz gave petitioner a seven (7) year guaranteed contract, (rather than his normal three (3) year contract) valued at 18 million dollars.

Following the Katz contract, petitioner was signed to a recording contract with RCA Victor Records on February 24, 1967. It is undisputed that Mr. Katz was instrumental in obtaining this contract for petitioner and that Mr. Katz had the stature to obtain a major RCA effort for petitioner.

In april of 1967, the Respondent charged off Petitioner's account and turned it over to

the bank's auditing department.

On June 9, 1967, John Russell of Respondent's auditing department ignoring Petitioner's note , swore out a warrant for Petitioner's arrest and extradition occurred. This ultimately resulted in Petitioner's erroneous conviction in a criminal trial for violations of the Tennessee Bad Check Law. The conviction was reversed on appeal.

This case followed the reversal of that conviction.

In the District Court's memorandum opinion, four facts were found to be true in connection with Petitioner's motion under Federal Rules of Civil Procedure, Rule 60(b)(6).

1. The trial Judge who granted the Respondent judgment notwithstanding the verdict held stock in the Respondent Bank prior to the trial.

2. The trial Judge who granted the Respondent judgment notwithstanding the verdict had a loan outstanding with the Respondent Bank at the

time of trial in excess of $58,000.

3. The trial Judge who granted the Respondent judgment notwithstanding the verdict did his personal banking with the Respondent Bank at the time of trial, and had done so for many years.

4. The trial Judge who granted Respondent judgment notwithstanding the verdict had worked as counsel for the Respondent Bank approximately 4 months from the date the trial commenced in the instant case. The trial Judge's legal services involved advising the bank regarding the proper handling of its lending contracts in light of certain charges in Tennessee law.

On or about October 23, 1978, the date set for commencement of the trial, a conference was held between the Court and counsel for the parties in which Judge Wiseman stated that as a lawyer prior to assuming the bench, he at one time had represented the Appellee Bank. The Judge also disclosed that he had previously represented the First National Bank of

Tullahoma which since 1973 had become a part of the Bank system. The Judge further stated that he then did all of his personal banking business with the First National Bank of Tullahoma, and had done so for thrity years. The Judge further stated that he was making such disclosures in order to allow counsel the opportunity to file a motion to recuse the Judge.

REASONS FOR GRANTING THE WRIT

I

A FEDERAL JUDGE IS UNDER A MANDATORY DUTY TO RECUSE HIMSELF FROM HEARING A CASE WHERE:

(1) THE JUDGE HAS RECENTLY REPRESENTED THE DEFENDANT IN THE CASE.

(2) THE JUDGE HAS RECENTLY HELD STOCK IN THE DEFENDANT BANK CORPORATION.

(3) THE JUDGE HAS AN OUTSTANDING LOAN WITH THE DEFENDANT BANK.

(4) THE JUDGE HAS DONE HIS PERSONAL BANKING WITH THE DEFENDANT BANK FOR MANY YEARS.

Title 28, United States Code, Section 455, provides, in pertinent part:

> "(a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> ...
>
> (1) Where in private practice he served as a lawyer in the matter in controversy.
>
> ...
>
> (2) He know that he, individually or as a ficudiary, or his spouse ... has a financial interest in the subject matter in controversy.
>
> ...
>
> (e) No justice, judge or magistrate shall accept from the parties to the procceding a waiver of any ground for disqualification enumerated in subsection (b)...."

The foregoing sections are grounded on the notion that the proper administration of justice requires of a judge not only actual impartiality but also the appearance of detached impartiality.

Texaco, Inc. v. Chandler 354 F.2d 655 (10th Cir. 1965).

Chief Judge Seitz, concurring in the Case of United States v. Schieber 599 F.2d 534 (3d Cir. 1979), in commenting on the scope and effect of Title 28, United States Code, Section 455, has noted:

> "A judge must determine, sua sponte, whether any of the grounds for disqualification enumerated in that section (28 USC 455) are present in a case. If any ground specified in Section 455(b) is present, he must disqualify himself immediately. If such specific grounds are not present, but if, for any reason, his impartiality might reasonably be questioned, he must either disqualify himself or seek a waiver after 'full disclosure on the record.' United States v. Schreiber, supra, at p. 519, Seitz, J. concurring. (emphasis added).

The District Court noted judicially in its Memorandum Opinion that Judge Wiseman had been engaged by the Respondent just prior to taking the bench to advise the Respondent as to its proper handling of its lending contracts ...." Record On Appeal, p. 79.

Judge Wiseman's Memorandum Opinion granting Respondent's motion for judgment notwithstanding the verdict is frought with numerous references to standard banking practices. Indeed, one of the main issues decided at Petitioner's trial was the propriety of the Bank's lending practices regarding the Appellant. It is unconceivable that during his employment by the Appellee Judge Wiseman did not acquire an extensive knowledge of Respondent's lending practices. This premise is in fact borne out by Judge Wisemans' Memorandum Opinion wherein he makes numerous findings regarding banking practices in direct contravention of the jury's findings:

> "Item: The note, if accepted, would have been initialed by a lending officer." Record on Appeal, p. 17.
>
> "Item: The note, if accepted, would have contained a teller stamp with a sequentially consecutive number assigned

to it."

Record on Appeal, p. 18.

"Item: The note in its consecutive numerical sequence would be entered in the 'committee book ledger'. Record on Appeal, p. 18.

"Item: The note would contain the stamp of the audit review committee . . . . " Id.

"It is unconceivable to this Court that any bank would accept a simple debt instrument note, unsecured and without a co-signor . . . ." Record On Appeal, p. 19 (emphasis added)

"Item: If the note were accepted in lieu of the checks, the checks should have been given up by the bank in exchange for the note. Id., (emphasis added).

A reading of the above excerpts, as well as the tone of the entire Opinion makes it abundantly clear that Judge Wiseman had extensive personal knowledge of the disputed facts in the litigation between the parties. His recusal was mandatory.

Assuming, arguendo, that mandatory recusal was not in order, the record amply supports the conclusion that recusal was mandated by Subsection (a) of Section 455.

If it cannot be said that Judge Wiseman had personal knowledge of the facts before him in this case, a reading of his Memorandum Opinion reveals that he had a great familiarity with standard banking practices as well as the lending practices of the Respondent.

It has been noted that a general familiarity with the facts at issue in a given case may affect the impartial judgment of a judge for two reasons. First, the judge's knowledge of the facts may lead him to evaluate their

legal significance and hence to prejudge the application of the law to those facts. Second, there is a danger that the judge will consider the facts not as they are presented in a trial or appear in the record, but in accordance with his own general knowledge of a given area. Disqualification Of Judges And Justices In The Federal Courts, 86 Harvard Law Review 736, 759-760 (1973).

In American Cyanamid v. F.T.C. 363 F.2d 757 (6th Cir. 1966), the Court addressed the question of mandatory recusal of a Federal Trade Commissioner in an administrative hearing. In American Cyanamid, the Court reviewed an order of the F.T.C. holding that certain drug companies violated certain regulations in the production and sale of a new drug. Evidence was presented to the Court that the Commission's chairman had formerly served as chief counsel of a Senate Subcommittee which had conducted an investigation of many of the same facts and issues presented in the F.T.C. proccedings. In reversing the decision of the F.T.C., the

Court stated:

> "'A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. Our system of law has always endeavored to prevent even the probability of unfairness.' . . . It is fundamental that both unfairness and the appearance of unfairness should be avoided. Wherever there may be reasonable suspicion of unfairness, it is best to disqualify . . . ." American Cyanamid v. F.T.C. 363 F.2d 757, 763 (6th Cir. 1966), cited with approval, U.S. v. Amerine 411 F.2d 1130, 1133 (6th Cir. 1969).

Petitioner recognizes that American Cyanamid involved proceedings of a regulartory agency and not a trial Court. The above-quoted principles, however, apply equally to administrative agencies which adjudicate as well as to courts. Gibson v. Berryhill 411 U.S. 564, 579 (1973).

Under Subsection (a) of Section 455, Judge Wiseman was not under a mandatory duty of recual provided that Petitioner waived the apparent conflict "after a full disclosure on the record of the bases for disqualification" Title 28, United States Code, Section 455(e). In this case, a

limited disclosure and subsequent "waiver" was of no effect because the judge failed to disclose the nature of the work he had done for the bank; the fact that one of his last clients before his recently assuming the bench was the Appellee; the fact that he recently held stock in the Appellee; and, the fact that he had a loan outstanding to the Respondent Bank, at the time of trial.

Petitioner submits that the Court of Appeals was manifestly in error when it concluded that no basis in fact existed for the mandatory self-recusal of Judge Wiseman.

II

THE FAILURE OF A JUDGE TO RECUSE HIMSELF UNDER CIRCUMSTANCES WHERE RECUSAL WAS MANDATORY REQUIRES REINSTATEMENT OF A JURY VERDICT SET ASIDE BY THE JUDGE'S GRANTING OF A JUDGMENT NOTWITHSTANDING THE VERDICT.

Federal Rules of Civil Procedure, Rule 60

(b)(6) empowers the Court with the authority to relieve a party from a final judgment upon such terms as are just. It has been held that the purpose of the above-quoted section is to vest a court with the power to vacate a judgment whenever special or extraordinary circumstances make such action appropriate to accomplish justice. United States v. Work Wear Corp. 602 F.2d 110 (6th Cir. 1979); Yanow v. Weyerhauser 274 F.2d 274 (9th Cir. 1959).

It is submitted that the special and extraordinary circumstances noted above are presented in this case. The jury in Petitioner's trial heard testimony from numerous witnesses over a four-day period. Only five NSF checks were offered against Petitioner, for which he had given a note, previously accepted by the Respondent. An additional 12 good checks were offered by Petitioner to support his claim of forgery.

At the end of the trial, the jury was instructed that to find in favor of the Petitioner

it had to find the Respondent had perpetrated fraud, forger, and perjury to obtain Petitioner's conviction. After the jury had deliberated, it found in favor of the Petitioner. This verdict was set aside by a Judge who represented the Bank just 4 months prior to trial, and who had wned stock in Respondent, and who had a loan outstanding with the Respondent, and who had done his banking with the Respondent for many years.

The appropriate remedy is to reinstate the jury's verdict.

CONCLUSION

For the foregoing reasons, awrit of certiorari should issue to review the judgment and opinion of the United States Court Of Appeals For The Sixth Circuit.

Respectfully submitted,

John J. Wessling

JOHN J. WESSLING
Attorney for Petitioner

NO. 83-5098

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DON RAY PHINNEY,	)	
	)	
Plaintiff-Appellant,	)	
	)	ON APPEAL FROM
v.	)	THE UNITED STATES
	)	DISTRICT COURT
FIRST AMERICAN NATIONAL BANK,	)	FOR THE MIDDLE
	)	DISTRICT OF
Defendant-Appellee.	)	TENNESSEE
	)	

BEFORE: JONES and WELLFORD, Circuit Judges, and UNTHANK, District Judge.*

PER CURIAM. Plaintiff, Don Ray Phinney, appeals from a judgment rendered in the United States District Court for the Middle District of Tennessee, Judge C. G. Neese sitting by designation. At issue is whether Judge Thomas A. Wiseman was required to recuse himself, sua sponte, from an earlier suit brought by Phinney against First American National Bank.

Phinney, prior to 1967, went to Nashville,

Tennessee, to launch a singing career. While in Nashville he wrote a total of 17 checks from a variety of banks, for which there was no account balance.* First American turned over seven of these checks, which were drawn on its accounts, to the prosecuting attorney for appropriate action. This ultimately resulted in Phinney being convicted in a criminal trial for violations of the Tennessee Bad Check Law. The conviction was reversed on appeal because the statute under which he had been indicted had been repealed.

Several years later, Phinney filed an action in the United States District Court for the Middle District of Tennessee, charging malicious prosecution and outrageous condict in vio-

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*Honorable G. Wix Unthank, United States District Court for the Eastern District of Kentucky, sitting by designation.

lation of the laws of Tennessee. Before that trial Judge Thomas Wiseman held a conference of the lawyers at which he advised them that he had represented, and had been a customer of,, First National Bank in Tullahoma, Tennessee, which had been acquired by First American Corporation (First American's parent corporation at the time) a few years prior to the trial. He also advised that he had done legal work for the banking industry in connection with Tennessee's 1978 Constitutional Convention concerning interest rate limitations. He said that he had been engaged by First American for a brief period of time following the convention for legal advice concerning interest rate matters, but his employment had ended prior to his taking the bench. He stated that he did not think that this would affect his judgment in the case, and asked whether either party had any objection to his sitting as judge on the case. No objections were made, and there was no inquiry made about details con-

cerning this past relationship.[1] At the beginning of the trial, the discussions were confirmed on the record and neither party filed any objection or motion for recusal.

At trial, the jury returned a verdict in favor of Phinney in the amount of $999,999 compensatory, and $250,000 punitive damages. First American filed a motion for a judgment notwithstanding the verdict, which was granted by Judge Wiseman. By an order of March 18, 1981, this court affirmed Judge Wiseman's action.

On August 26, 1982, Phinney filed a motion to vacate Judge Wiseman's order, based upon Judge Wiseman's failure to recuse himself, sua sponte, from sitting as the judge at the trial. On December 8, 1982, District Judge C. G. Neese entered a memorandum opinion

1. We find it of little significance that Judge Wiseman had also entered into a still existing mortgage arrangementwith the First National Bank of Tullahoma,and that he had once owned stock in appellee Bank. He had no existing conflict, therefore, at any time during the proceedings.

and order denying Phinney's motion following a hearing. A motion for reconsideration was denied on January 7, 1983, and Phinney appealed to this Court.

We first note that Phinney's appeal is based on Federal Rule of Civil Procedure 60(b)(6). The issue faced by this court, is, therefore, whether Judge Neese abused his discretion. See, Browder v. Director, Ill. Dept. of Corrections, 434 U.S. 257, 263 n.7 (1978). Judge Neese was also faced with a similar standard of review. He determined that Judge Wiseman's failure to recuse himself was not an abuse of discretion. S. J. Groves & Sons. v. International Brotherhood of Teamsters, 581 F.2d 1241, 1248 (7th Cir. 1978); United States v. Schreiber, 399 F.2d 534, 536 (3d Cir. 1979); Blizard v. Frenchette, 601 F.2d 1217, 1221 (1st Cir. 1979). We are therefore placed in the unusual posture of decidding whether Judge Neese abused his discretion. Upon examination of the record, we find that both judges acted properly.

Before trial began, Judge Wiseman made a substantial disclosure of his past involvement with First American and the banking industry. Both parties had a clear opportunity to explore this issue further, but neither did so. Judge Wiseman's order granting judgment n.o.v. was reviewed by a panel of this court, which affirmed it on the merits. The panel found that Judge Wiseman's opinion was "well reasoned," as well as "careful and thorough."

While we believe that Phinney may have been attempting to get a "second bite at the apple," by pursuting this appeal, we do not find his appeal so frivolous as to warrant sanctions as suggested by appellee. We hold that Judge Wiseman's refusal to recuse himself, sua sponte, was clearly proper, and therefore Judge Neese's opinion of December 8, 1982, and his denial of a motion for reconsideeration, dated January 7, 1983, are hereby AFFIRMED.

ISSUED AS MANDATE: April 3, 1984
COSTS: NONE
John P. Hehman, Clerk

By /s/ Audrey Crockett
DEPUTY CLERK

CERTIFICATE OF SERVICE

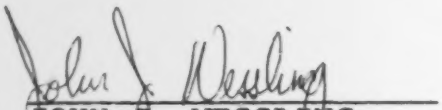
STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I am a citizen of the United States, a member of the Bar of the United States Supreme Court, and a resident of the county aforesaid. I am over the age of 18 years and not a party to the within entitled action; my business address is 221 East Walnut Street, Suite 110, Pasadena, California 91101.

On June 6, 1984, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action by placing three true copies in a sealed envelope, with postage thereon fully prepaid in the United States Mail at Pasadena, California, addressed as follows:

BASS, BARRY & SIMS
2700 First American Center
Nashville, Tennessee 37238

I certify under penalty of perjury that the foregoing is true and correct and was executed on June 6, 1984, at Pasadena, California



JOHN J. WESSLING
Member of the Bar of
Bar of the United
States Supreme Court
and Attorney for
Petitioner DON RAY
PHINNEY